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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 170

HARRY HERMAN SLACKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (R. 327) is reported at 196 F. 2d 501.

JURISDICTION

The judgment of the Court of Appeals was entered on May 15, 1952 (R. 328), and a petition for rehearing (R. 328–331) was denied on June 2, 1952 (R. 331). The petition for a writ of certiorari was filed on July 2, 1952. The jurisdiction of this Court is invoked under 28 U. S. C.

1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to prove venue and to sustain the conviction.

2. Whether the trial court adequately instructed the jury as to the offense charged.

3. Whether the trial court permitted the introduction of hearsay evidence to the prejudice of petitioner.

STATUTE INVOLVED

18 U. S. C. (Supp. V) 202 provides:

> Whoever, being an officer or employee of, or person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or agency thereof, or an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, asks, accepts, or receives any money, or any check, order, contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount

of such money or value of such thing or imprisoned not more than three years, or both; and shall forfeit his office or place and be disqualified from holding any office of honor, trust, or profit under the United States.

This section shall not apply to violations of section 213 of this title.

STATEMENT

A one-count indictment (R. 1–2) was filed against petitioner in the United States District Court for the Northern District of Texas, charging that on May 7, 1951, while employed as a civilian inspector by the New York Quartermaster Procurement Agency of the United States Army, he "did ask, accept and receive," in Dallas County, Texas, $286, with intent to have influenced thereby his decision and action on a matter pending before him in his official capacity.[1] On September 21, 1951, following a trial by jury, petitioner was convicted (R. 319), and sentenced to three years' imprisonment and a fine of $500 (R. 14–15). On appeal, the judgment of conviction was affirmed *per curiam* (R. 327).

The evidence adduced by the Government may be summarized as follows:

Petitioner was employed, since 1938, as a civilian inspector by the Inspection Service of the

[1] The indictment does not cite any statute or other provision of law which the act charged therein violated, but its phraseology follows almost verbatim the provisions of 18 U. S. C. 202. Cf. R. 15.

New York Quartermaster Procurement Agency, an agency of the United States (R. 25–26, 41). In March 1951, he was assigned to Dallas, Texas, where he was required to inspect, in addition to other clothing manufacturers located there, the workmanship of the Cassidy Manufacturing Company, which was under contract with the Quartermaster Procurement Agency in New York to manufacture for the United States Army a large quantity of cotton khaki trousers according to certain specifications (R. 26–29, 30–31, 56, 78, 83–84). Specifically, he was required to see that the work was in accordance with contractual specifications, to pass or reject lots of the finished product, and to submit inspection reports to the New York Quartermaster office (R. 26, 61, 84). The Cassidy plant and warehouse were located on Main Street, in Dallas, Texas (R. 37, 38, 47, 48, 51, 89).

Shortly after petitioner's assignment to Dallas, he examined a lot of trousers manufactured by the Cassidy Company and rejected it, because it failed to meet the contractual requirements (R. 48–49, 61–62, 69, 78, 84, 85). Following this rejection, Ferguson, who was Cassidy's sales and merchandise manager, and who was very friendly with petitioner, had a conversation with the latter in a cafe next door to the Cassidy factory. Ferguson testified as follows (R. 59–61, 62–63):

> * * * I asked him why he was so hard on the boys. I said, "This contract is

about to break them here, you are making it pretty rough on them."

And, he said, "Well, if I do them a favor, what will they do for me?"

I said, "Harry, they will be very grateful." I said, "What could they do?"

He said, "What does your forelady get?"

I said, "Fifty dollars a week."

He said, "Well, I could work in your plant a couple of days a week and get your plant straightened out." And, he said, "Well, pass the word along to the boys", which I did.

Q. Who were the boys?

A. Roland Cassidy and Edward Cassidy.[2]

Q. Did you pass the word on?

A. Yes.

On April 26, 1951, several days after Ferguson informed him of his conversation with petitioner, Roland Cassidy notified the F. B. I. (R. 87, 89, 90, 91, 108, 68, 70, 74–75, 77, 132, 134, 136–137, 140, 153–154, 159).

On a subsequent occasion, after Ferguson had informed petitioner that negotiations were pending with the Quartermaster's Office in New York to have the Government accept the rejected lot of trousers at a reduced price, petitioner requested that Ferguson see him the following Monday (R. 63–64). On the appointed day in Dallas, Ferguson informed petitioner that the

[2] Roland and Edward Cassidy, together with their mother, were partners in the Cassidy Manufacturing Company (R. 105–106, 52).

Quartermaster's Office had "agreed to accept the garments at a five cent per pair reduction from the contract price," provided the lot was "re-screened," that is, re-inspected and all repairable defects in the trousers corrected (R. 65–66, 93–94, 63). Petitioner then told Ferguson that he would pass the lot of trousers "for ten cents a pair," less the amount per pair to be deducted by the Government (R. 64–67).[3] Thereupon, Ferguson told petitioner that he would send Roland Cassidy to speak to him, to which petitioner assented (R. 66). Petitioner then told Ferguson that, "after this is cleaned up, the fifty dollars goes into effect," referring to his original suggestion, during their first conversation, that he could work in the "plant a couple of days a week" to get it "straightened out", for which Cassidy ought to pay him $50 a week (R. 66, 63, 67, 68).[4]

On May 1, 1951, petitioner escorted Roland Cassidy across the street from the Cassidy warehouse for a lengthy conversation during which he told Cassidy "That he was not a shakedown artist, that he was not a man that could be capable of asking for a bribe, but that he was being forced to do so," and that if Cassidy worked with him he would have the trousers passed, but "that it

[3] The cost to the Cassidy Company in "re-screening" and repairing the rejected lot of trousers would have averaged 30 to 35 cents per pair (R. 66, 67, 96 97).

[4] There remained a balance of about 40,000 pairs of trousers to be manufactured under the contract (R. 67).

would take cash" to do it. He also told Cassidy that the amount of money required "would be as he had outlined to Mr. Ferguson" (R. 89–90, 91, 92–93). He confirmed Cassidy's observation that the amount was to be computed at the rate of five cents per pair of trousers, since the Government was to deduct five cents from the contract price (R. 92, 95–96). Later Cassidy told petitioner that he "would go through with it," and that he would have the garments ready for petitioner's inspection on Monday, May 7, 1951 (R. 93, 97).

At the suggestion of the F. B. I., Cassidy withdrew from his bank $286[*] in bills of various denominations and recorded their serial numbers (R. 98–99, 110–112, 146–147, 158–159). During that weekend, Cassidy had "re-screened" the lot of trousers previously rejected by petitioner, without advising petitioner of his action (R. 97–98). During the same weekend, petitioner mentioned to one Truitt, a private subcontractor engaged in packing and boxing for shipment materials manufactured by Government contractors, that he would have a large shipment of trousers from Cassidy for him to handle on Monday (R. 175–176).

On May 7, 1951, petitioner, after receiving a telephone call from Cassidy that the garments were ready for inspection, appeared at the Cas-

[*] This amount was computed by multiplying five cents by 5,720, the number of garments constituting the rejected lot (R. 99, 159).

sidy plant, where the following conversation, according to Cassidy's testimony, ensued between them (R. 86, 98, 99, 142, 163, 168, 100):

> * * * We looked the garments over, and he asked me, "What is the deal?"
>
> My response to that was, "What is the deal? I thought we had a deal?"
>
> He said, "That is what I mean. Do you have the money with you?"
>
> I said, "Yes, I have the money in my pocket."
>
> He said, "Very well, we will proceed with the inspection." [R. 100.]

Following the inspection and approval of the lot of trousers, petitioner and Cassidy repaired to a restaurant located next door to the plant (R. 101, 102, 142, 168). In the course of their luncheon, Cassidy handed to petitioner $286 in rolled-up bills, which he had withdrawn from the bank a few days before (R. 102–103). Petitioner "took the money in his left hand, * * * opened the money up and fanned it out and placed it in its original position, and put it in his pocket" (R. 103). Shortly thereafter, petitioner left the restaurant alone and returned to the Cassidy plant (R. 103, 105, 142, 168). Cassidy followed him a few minutes later, giving a pre-arranged signal to several F. B. I. agents, who were watching the restaurant from across the street but did not witness the transaction between Cassidy and petitioner (R. 103–104, 141, 149–150, 172–173). The F. B. I. agents immediately arrested petitioner.

In the left side-pocket of his trousers they found $286 in various double-folded bills, the serial numbers of which corresponded to those previously given them by Cassidy (R. 144, 145–147, 167, 169, 170). When the agents showed petitioner the money they took from his pocket, he remarked, "Where did that come from?" (R. 151.)

Petitioner testified in his own behalf (R. 223–285). He denied that he had ever asked, received or accepted any money from Cassidy, or that the latter had ever "suggested" or offered to pay him any money for the purpose of influencing him in his official action (R. 267, 274, 283). He testified that he passed on the merits the lot of trousers which he inspected on May 7, 1951 (R. 274–275, 276, 277). He further testified that during the inspection on that date he was "crowded" by Reynolds and Cassidy in limited quarters around the inspection table at the Cassidy plant, and that Cassidy, without petitioner's knowledge, at some time had "slipped" the money into his pocket (R. 258, 259–260, 278).[6]

ARGUMENT

1. Petitioner's claim (Br. 3–9) that the evidence was insufficient, either (a) to prove venue,

[6] In rebuttal, Reynolds testified that during the inspection he did not "bump" into petitioner nor did he put anything into petitioner's pockets, and that he did not see Cassidy put anything into petitioner's pockets (R. 301). Cassidy also denied doing so (R. 305).

or (b) to sustain the conviction, is clearly without merit.

(a) The evidence was more than sufficient to establish that the acts charged in the indictment took place within the district where the venue was laid. There was affirmative evidence that the plant and warehouse of the Cassidy Manufacturing Company were located on Main Street in Dallas, Texas (R. 37, 38, 47, 48, 51, 89). It was clearly shown that the conversations during which petitioner asked and negotiated for a bribe with Ferguson and Cassidy took place at a restaurant adjoining the Cassidy plant and on a street across from the Cassidy warehouse (R. 62, 89–90). The evidence is also clear that petitioner accepted and received $286 from Cassidy at the restaurant adjacent to the Cassidy plant (R. 102–103). Certainly a jury could find from this evidence that the bribe was sought and accepted in Dallas, Texas. The rule is well settled, as stated in *United States* v. *Jones,* 174 F. 2d 746, 748–749 (C. A. 7), on which petitioner relies, that "Venue does not have to be proved by direct and positive evidence. If, upon the whole evidence, it may reasonably be inferred that the crime was committed where the venue was laid, that is sufficient." See also *United States* v. *Karavias,* 170 F. 2d 968, 970 (C. A. 7), and *Wallace* v. *United States,* 243 Fed. 300, 306 (C. A. 7).

(b) The argument (Br. 5–9) that the evidence was insufficient to sustain the conviction is based

on petitioner's claim that Cassidy was as a matter of law his accomplice and that, therefore, his testimony should not have been permitted to go before a jury without a warning to scrutinize it as that of an accomplice.

However, the record clearly shows that Cassidy was not, either as a matter of law or of fact, an accomplice of petitioner in the crime charged. As petitioner himself emphatically brought out during the trial (R. 108–112, 136–137, 153–154, 159), Cassidy had acted in close liaison with the F. B. I. from the day he had reported petitioner's proposition to Ferguson. Factually, this negatives any criminal intent on Cassidy's part to commit the crime of bribery.[7] Thus, according to law, he was not "an associate in guilt" with petitioner in the commission of the crime of bribery nor a *particeps criminis* therein as a principal or accessory. *United States* v. *Balodimas,* 177 F. 2d 485, 487 (C. A. 7); *Singer* v. *United States,* 278 Fed. 415, 419 (C. A. 3); see also *Grimm* v. *United States,* 156 U. S. 604; *Ritzman* v. *United States,* 3 F. 2d 718 (C. A. D. C.). It is well established that a decoy, utilized by an enforcement agency for the purpose of securing evidence, "is not regarded as an accomplice, not having the same

[7] Cassidy repeatedly testified that he did not intend to act corruptly in giving $286 to petitioner (R. 114, 131, 133–134, 267, 305–306). Petitioner erroneously claims (Br. 8) that such statement contradicts Cassidy's testimony relative to his payment of a "bribe" to petitioner.

motive to fabricate his story." *United States* v. *Becker*, 62 F. 2d 1007, 1009 (C. A. 2); See also *Grimm* v. *United States*, *supra*.

On petitioner's own theory of defense, Cassidy was not an accomplice. Petitioner's version was that there was no bribe but that Cassidy had surreptitiously planted the money. To have charged on the law of accomplices would have been to assume, contrary to petitioner's claim, that a crime had in fact been committed and would thus have been prejudicial to petitioner. See *United States* v. *Balodimas*, 177 F. 2d 485, 487 (C. A. 7); compare *Lee* v. *United States*, 32 F. 2d 424 (C. A. D. C.).

The possibility of a motive on the part of Cassidy to fabricate evidence was more than adequately covered by the trial judge in the following portion of its charge (R. 315–316):

> On the other hand, if you believe and find that the manufacturer, Roland Cassidy, secretly and surreptitiously slipped into his pocket the sum of $286.00 for the purpose of getting him into trouble, or, for some motive peculiar to himself, and that the defendant did not know that it had been placed in there, then, and in that event, you will acquit him, or, if you have a reasonable doubt, you will acquit him.
>
> Where a witness has a direct and personal interest in the result of a case, the temptation is strong to color, to pervert or

withhold the facts; the deep personal interest which he may have as the result of a trial should be considered by the jury in hearing evidence, to determine how far, or to what extent, if at all, it is worthy of belief, and that test applies to any witness that may be interested.

Then, again, you may take into consideration the motives of the parties that cause them to so act. The defendant insists, for instance, that Cassidy placed this money in his pocket, and then caused him to be arrested. You may, in the light of the natural and normal conduct of human beings, take into consideration the motive, or whether there was a motive, which would have prompted such conduct. If you find that there was a motive and that it actually occurred as claimed by the defendant and his counsel, then you will acquit the defendant.

On the other hand, if you find no motive, then you may take that into consideration in weighing the testimony as a whole.

2. Petitioner's contention (Br. 9–21), that the trial court committed reversible error in its charge to the jury in that it (a) gave an erroneous instruction with respect to evidence of petitioner's good reputation, (b) improperly charged with respect to entrapment, and (c) failed to charge on "the law applicable to the case," is without substance.

(a) With respect to the testimony concerning petitioner's good reputation, the trial court charged the jury as follows (R. 317):

> Then again, on the subject of reputation of [sic] witnesses, you are entitled to listen to each and to take into consideration how well the people know him, and if the evidence has, or may have established a reputation of good character, you may take that into consideration, with the other evidence, and if all of the evidence combined creates a reasonable doubt in your mind, you will acquit the defendant.

Clearly, the second preposition, "of," in the quoted paragraph is superfluous, and was employed inadvertently by the trial judge. It is clear from its context that the charge could have reference only to the five witnesses (R. 191–197, 286–290), who testified concerning the good reputation enjoyed by petitioner for truth and veracity, and nothing else. It requires tortuous reasoning to follow petitioner's interpretation (Br. 10) of that portion of the charge as having reference to the witnesses' own reputation for truth and veracity. It is unlikely that the jury could have so misinterpreted the charge, since the credibility of none of petitioner's witnesses was challenged and there was no evidence as to their reputations. Aside from superfluity, the challenged portion of the charge stated the correct rule of law on the subject, and was substantially

as requested by petitioner (R. 10).[5] *Edgington* v. *United States*, 164 U. S. 361; *United States* v. *Frischling*, 160 F. 2d 370 (C. A. 3); *Sunderland* v. *United States*, 19 F. 2d 202, 214–215 (C. A. 8). Petitioner was not entitled to an instruction on this subject in any prescribed form. See *Sunderland* v. *United States*, *supra*, at 215; *Warren* v. *United States*, 250 Fed. 89 (C. A. 8); see also *Kreiner* v. *United States*, 11 F. 2d 722, 724–732 (C. A. 2), certiorari denied, 271 U. S. 688.

(b) Petitioner's objection (Br. 14–19) to the portion of the charge which made reference to the law of entrapment is precluded at this time by Rule 30, F. R. Crim. P., since he failed to make a proper objection thereto prior to the jury's deliberation.

However, even if a timely objection were made, we submit that the charge was correct. In view of petitioner's repeated intimation, during his cross-examination of most Government witnesses,

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[5] Petitioner had requested the trial court to charge as follows (R. 10):

"I charge you, as part of the law of this case, that reputation for good character if established, might alone generate or create a reasonable doubt of the defendant's guilt.

"Now bearing the foregoing in mind you are instructed that if you believe and find from the evidence that the reputation of the defendant's good character has been established, that such fact should be considered by you along with the other facts in the case and which, when so considered, may like other facts generate a reasonable doubt of the defendant's guilt which would justify the acquittal of the defendant."

that he had been entrapped (R. 72, 108–109, 147, 155–156, 158, 166), a request on the part of the Government for a charge on that subject is understandable. Nevertheless, the trial court refused to charge specifically on that subject (R. 318). Instead, it charged "that it is permissible for officers of the law, if they have reason to believe that the law is being broken, to have someone to use as a decoy to lead the suspected victim into a test as to whether he will, or is, violating the law, but if that is so done as to lead an innocent man to do something that he would not have done but for the manner in which it is so applied, the government would be guilty of entrapment, and the defendant could not be convicted under those circumstances" (R. 318).

(c) Petitioner's claim (Br. 19–21) that the trial court failed to charge on "the law applicable to the case" is also foreclosed by Rule 30, F. R. Crim. P., for failure to make an objection to that effect prior to the jury's deliberation.

Furthermore, although the trial court did not read the statute defining the offense, it did read the indictment (R. 313) and did cover the elements of the crime charged (R. 314–315, 316). The jury did not, as petitioner contends (Br. 20), have "to conjecture as to what constituted the offense charged." As petitioner admits (Br. 15), "the issue formed by the evidence was simple, in that, the appellant either did accept a bribe or else the money was slipped into his pocket sur-

reptitiously." At petitioner's request the court specifically charged (R. 317):

> You are instructed if you find from the evidence that the sum of $286.00 was placed in his pocket without his knowledge and consent, by the witness Cassidy, for the purpose of having the defendant searched and arrested, so as to reflect upon the integrity of the defendant and the Inspection Service, with which he was employed at the time, and that said defendant did not know that said money was placed in his pocket, and did not ask, accept, or receive such money with intent to have his decision in approving the lot, or batch of manufactured trousers influenced in accepting and approving said manufactured trousers for shipment, then you will find the defendant not guilty. If you should have a reasonable doubt thereof, you will acquit him.

3. All of petitioner's objections to alleged hearsay (Br. 21–25) relate to the applications of the following ruling by the trial court (R. 89):

> * * * If he tells the conversation itself, it is hearsay, but the fact that he had a conversation is not hearsay.

This was, however, clearly correct. Cf. *Hicks* v. *United States*, 173 F. 2d 570 (C. A. 4), certiorari denied, 337 U. S. 945; *Murray* v. *United States*, 10 F. 2d 409, 411 (C. A. 7), certiorari denied, 271 U. S. 673.

Moreover, the details of conversations were elicited by petitioner's cross-examination of government witnesses (R. 108–109, 111, 112, 132, 134, 137, 153–154, 157–159, 167, 171, 172). By this action, petitioner waived any objection to the conversation as hearsay. Cf. *Enrique Rivera* v. *United States*, 57 F. 2d 816, 820 (C. A. 1); *Hermansky* v. *United States*, 7 F. 2d 458, 460 (C. A. 8).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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